

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK ROBERT QUIROZ,

Plaintiff,

v.

WILLIAMS CATE, et al.,

Defendants.

No. C 11-0016 LHK (PR)

ORDER DENYING MOTION TO  
DISMISS AND MOTION FOR  
SUMMARY JUDGMENT  
WITHOUT PREJUDICE

(Docket No. 206)

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that defendants violated his constitutional rights. On October 29, 2013, most of the defendants filed a motion to dismiss for failure to exhaust along with a motion for summary judgment. However, the Ninth Circuit recently overruled *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(a) (“PLRA”), should be raised by a defendant as an unenumerated Rule 12(b) motion. *Albino v. Baca*, No. 10-55702, 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). “[A] failure to exhaust is more appropriately handled under the framework of the existing rules than under an ‘unenumerated’ (that is, non-existent) rule.” *Id.*

Under the new law of the circuit, in the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). *Id.* Otherwise,


1 defendants must produce evidence proving failure to exhaust in a motion for summary judgment  
2 under Rule 56. *Id.* Defendants must present probative evidence that there was an available  
3 administrative remedy and that the prisoner did not exhaust that available administrative remedy.  
4 *Id.* at \*5, \*8.

5 In view of *Albino*, defendants' motion to dismiss this action under the unenumerated  
6 portion of Rule 12(b) for failure to exhaust available administrative remedies, as required by the  
7 PLRA, is DENIED. As a matter of efficiency, defendants' motion for summary judgment, which  
8 is presented in the same pleading, is also DENIED. These denials are without prejudice to  
9 defendants renewing their failure to exhaust defense in a comprehensive motion for summary  
10 judgment, if appropriate.

11 In order to expedite these proceedings, defendants must serve and file a motion for  
12 summary judgment (whether or not they choose to raise a failure to exhaust defense) within 30  
13 days of this order. Plaintiff must serve and file an opposition or statement of non-opposition to  
14 the motion not more than 28 days after the motion is served and filed, and defendants must serve  
15 and file a reply to an opposition not more than 14 days after the opposition is served and filed.

16 IT IS SO ORDERED.

17 DATED: 5/12/14

  
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LUCY H. KOH  
United States District Judge